

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)	CSR-5714-E
)	
Amzak Cable Midwest, Inc., d/b/a)	New Ulm, Minnesota
Time Warner Cable)	CUID No. NM0033
)	
Petition For Determination of)	
Effective Competition)	

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2003

Released: July 9, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Amzak Cable Midwest, Inc., d/b/a Time Warner Cable (“Time Warner”) has filed a Petition for Special Relief seeking a determination of effective competition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission’s rules, and an order to revoke the basic rate certification authority of the City of New Ulm, Minnesota.¹ Time Warner asserts that it is subject to local exchange carrier (“LEC”)² effective competition in the above-captioned community because of the presence of New Ulm Telecom, Inc.’s (“NT”) cable services in that community. The petition is unopposed. For the reasons discussed below, the petition is granted.

II. BACKGROUND

2. Section 623(a)(4) of the Communications Act of 1934, as amended (“Communications Act”) allows franchising authorities to become certified to regulate basic cable service rates of cable

¹ 47 C.F.R. §§ 76.7, 76.905(b)(4) and 76.907.

² The Communications Act of 1934, as amended, defines the term “local exchange carrier” as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

47 U.C.S. § 153(26).

operators which are not subject to effective competition.³ In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined in the Communications Act.⁴ The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission's rules, is present in the franchise area.⁵ Section 623(1)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁶

3. The Commission has stated that an incumbent cable operator could satisfy the "LEC" effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.⁷ The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its service so that potential customers are aware that the LEC's services may be purchased, that the LEC actually has begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.⁸

III. DISCUSSION

4. Time Warner states that it operates a cable television system serving New Ulm, Minnesota. Time Warner also states that NT operates a franchised cable system that serves the same community. With regard to the LEC affiliation requirement, Time Warner provides exhibits demonstrating that NT is a local exchange carrier serving customers in Minnesota.⁹ Therefore, as to the first part of the LEC effective competition test, which requires that the alleged competitive service be provided by a LEC or its affiliate (or any multichannel video programming distributor ("MVPD") using the facilities of such LEC or its affiliate), Time Warner has provided sufficient evidence demonstrating that NT is an MVPD affiliated with a LEC. Accordingly, Time Warner satisfies the affiliation prong of the LEC effective competition test. We also find that Time Warner is unaffiliated with NT.

5. With regard to the requirement that the LEC competitor offer video programming service in the unaffiliated cable operator's franchise area, Time Warner asserts that NT is now providing such

³ 47 U.S.C. § 543(a)(4).

⁴ 47 U.S.C. § 543(1); *see also* 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905; *see also* 47 C.F.R. § 76.906 & 76.907.

⁶ 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 623(1) may be referred to as the "LEC" effective competition test.

⁷ *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

⁸ *Id.*

⁹ Time Warner Petition at 3, and Exhibit B.

service to New Ulm subscribers. To substantiate its claim, Time Warner has submitted informational materials relating to NT's service, such as direct mail advertisements, web site data, and local newspaper articles, to demonstrate that NT is currently offering service.¹⁰ In addition, Time Warner also provided NT's franchise agreement with the City to show that competitive service is available to subscribers throughout the franchise area.¹¹ As Time Warner has stated, the steps taken by NT, pursuant to its franchise, prove that there are no regulatory, technical or other impediments to the receipt of NT's service by residents of New Ulm.¹²

6. Time Warner also demonstrated that potential subscribers in New Ulm are reasonably aware that they may purchase the services offered by NT. Time Warner has submitted exhibits illustrating NT's marketing and public relations efforts as evidence that New Ulm residents are reasonably aware that they may purchase NT's video service.¹³ As noted by Time Warner, because consumers in the community have switched to NT's competing cable service, it must be assumed that other residents throughout the area are reasonably aware of NT's cable service offerings.¹⁴ Based on all of the information before us, we find that NT is offering service in New Ulm, as required by the LEC effective competition test.

7. We also find that Time Warner has submitted sufficient evidence to demonstrate that the programming of NT is comparable to that of Time Warner. The channel lineup for NT submitted by Time Warner establishes that NT offers over 90 channels, including nonbroadcast programming services such as ESPN, Home Box Office ("HBO") and CNN, as well as several local broadcast channels.¹⁵ This channel lineup compares closely with the programming available on Time Warner's systems serving New Ulm.¹⁶ Accordingly, we find that Time Warner has satisfied the programming comparability requirement.¹⁷

8. In conclusion, as Time Warner has submitted evidence sufficient to demonstrate that its cable system serving New Ulm is subject to LEC effective competition, its petition is granted, and the certification of the City is revoked.

¹⁰ *Id.* at 5, and Exhibit A.

¹¹ *Id.*, and Exhibit C.

¹² *Id.* at 6-7.

¹³ *Id.*, and Exhibit A.

¹⁴ *Id.* at 6. Time Warner states that it has lost more than 300 customers to NT's video service. *See* Declaration of Lance Leopold, Director of Public Affairs for Amzak Cable Midwest, Inc. (attached to Time Warner's Petition)

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 9, and Exhibit E.

¹⁷ 47 C.F.R. § 76.905(g).

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the Petition for Special Relief filed by Amzak Cable Midwest, d/b/a Time Warner Cable seeking a determination that its cable television system serving New Ulm, Minnesota is subject to effective competition **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that the certification of New Ulm, Minnesota to regulate the basic service cable rates **IS REVOKED**.

11. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules, as amended.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

¹⁸ 47 C.F.R. § 0.283.